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SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-305

ALABAMA DAIRY COMMISSION AND
ASSOCIATED MILK PRODUCERS, INC.,

Petitioners,

vs.

DELVIEW MEADOW GOLD DIVISION,
BEATRICE FOODS COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cases and Authorities ...ii

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....3

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

TABLE OF CASES AND AUTHORITIES

Page

Appeal of Arcadia Dairy Farms, Inc., 223 S.E.2d 323 (N.C. 1976)...7,8

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935)....13

16 C.J.S., pages 471, 472 & 474...11

Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978)..1,2,3, 4,9,13

Dean Milk Co. v. Madison, 340 U.S. at 354, 71 S.Ct. at 297 13

Kass v. Brannan, 196 F.2d 791 (2d Cir. 1951)..5

Norwood v. Goldsmith, 168 Ala. 224, 53 So. 84.....12

Opinion of the Justices, 262 Ala. 180, 78 So.2d 1.....5

Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n.9, 84 S.Ct. 378, 386, 11 L.Ed.2d 389 (1964) 12

QUESTION PRESENTED

Should this Court review by certiorari a decision by the Supreme Court of Alabama holding that a mere amendment to an unconstitutional order of the Alabama Dairy Commission is also unconstitutional when the state court decision was in accord with a final decision of the federal courts in the case of Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978)?

STATEMENT OF THE CASE

On January 16, 1976, the Alabama Dairy Commission (ADC) issued Order 2-76 as an amendment to ADC Order 3-75-1. The purpose of Order 2-76 was to force milk distributors to use locally produced fluid milk in making buttermilk rather than out-of-state powdered milk. To accomplish this purpose, Order 2-76 established a system of compensatory payments from milk distributors for the benefit of milk producers so that distributors who made buttermilk from powdered milk (rather than from fluid milk) would nevertheless be required to pay the highest Class I price for the producers' surplus

fluid milk which was not used by the distributors in making buttermilk.

The parent regulation of Order 2-76 was declared unconstitutional by the U.S. Court of Appeals for the Fifth Circuit in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978). Petitioners in the present case were the losing parties in Dairymen. In accord with Dairymen and other federal and state cases, the Alabama Supreme Court declared Order 2-76 in violation of the due process clauses of the United States and Alabama Constitutions.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Alabama is accurate and correct and reached the right result and the opinion below is in accord with the decision of the U.S. Court of Appeals for the Fifth Circuit in Dairymen, Inc. v. Alabama Dairy Commission, supra, and other federal and state cases. The petition for a writ of certiorari should therefore be denied.

ARGUMENT

The decision of the Alabama Supreme Court in this case is in accord with the recent decision in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978). The Court in Dairymen declared unconstitutional ADC Order 3-75-1, which established a system of milk quota regulations for the State of Alabama. ADC Order 2-76, which is at issue in the present case, is a mere amendment to the unconstitutional Order 3-75-1.

Petitioners in the present case were also the losing parties in Dairymen. Petitioners failed to appeal the Dairymen decision to this Court, yet they persisted in their efforts in the Alabama State Courts to have the amendment to an unconstitutional order upheld. Obviously, if Petitioners were going to attempt to uphold Order 2-76, it would have been necessary for them to appeal the Dairymen decision to this Court and to attempt to convince this Court that the parent regulatory order was valid. Only if the original order was valid could an amendment to it possibly be valid.

However, after failing to appeal the Dairymen decision to this Court, Petitioners now seek certiorari here so they can ask this Court to reverse the decision of the Alabama Supreme Court and thereby uphold an amendment to an unconstitutional order. Petitioners are seeking to have this Court review by certiorari the constitutionality of an amendment to a regulatory order which has been finally declared to be unconstitutional by the Federal Courts. Such a petition is unrealistic on its face because the constitutional downfall of 3-75-1 automatically carried 2-76 down with it.

The amendment to Order 3-75-1 has no sensible meaning whatsoever without its inclusion as a part of Order 3-75-1. Order 2-76, alone, is unworkable, unenforceable, arbitrary, unreasonable and is an absolute nullity. It is a child without a legitimate parent. All courts have uniformly and universally recognized that an amendment can have no greater constitutional validity than the original order. Without Order 3-75-1, there is no milk quota system in Alabama. There is no Class I Milk. There is no Class II or Surplus Milk. There is simply no viable

milk regulatory scheme to which Order 2-76 can apply since the Alabama Milk Regulatory System is no longer in existence. Order 2-76 cannot give life to a dead regulation. It is not possible to graft a live tree on a dead tree; nothing from nothing can arise. Under no circumstances could 2-76 put life in the corpse of 3-75-1. Therefore, since the original regulation (3-75-1) is unconstitutional and void, the amending regulation (2-76) is likewise unconstitutional and void. Opinion of the Justices, 262 Ala. 180, 78 So.2d 1

In addition, even if the provisions of Order 2-76 were part of an otherwise constitutional milk regulatory system, they would still be unconstitutional because they take away the property (money) of the distributors in violation of due process of law. The decision of the Alabama Supreme Court shows this to be the case when it quotes with approval the reasoning in Kass v. Brannan, 196 F.2d 791 (2d Cir. 1951). Kass recognized that similar type payments labeled as "compensatory" may be more accurately described as "penalties" on milk distributors. Likewise, the Court below concluded that the compensatory payments required of

distributors by ADC Order 2-76 are, in effect, a penalty or tax on the distributors, arbitrarily and unreasonably discriminating against them for their use of a legitimate production process in making buttermilk (i.e., the use of powdered milk rather than fluid milk). It is undisputed that buttermilk is equally as wholesome, healthful and tasty regardless of whether it is made from powdered milk or fluid milk. Powdered milk is merely milk in a different form. At the time of Order 2-76, approximately three-fourths of all buttermilk being made and consumed in Alabama was made from powdered milk. Therefore, the Alabama Supreme Court very properly held that an arbitrary and unreasonable penalty or tax on the use of a legitimate production process is a violation of due process. This flagrant discrimination against a legitimate production process is what distinguishes 2-76 from the regulations upheld in the cases relied on by Petitioners.

Due process under the Constitution simply prohibits such discrimination by a state regulatory commission against one group of private citizens (distributors) for the sole benefit of another group of

private citizens (producers). The Court below accurately described the arbitrary and unreasonable nature of ADC Order 2-76 as follows:

> ". . .ADC Order 2-76, however, deprives distributors of their property, money, in a manner that is arbitrary and unreasonable. The distributors' money is taken by the ADC to be paid to producers for milk presently or subsequently received but never used in making the buttermilk. Although the money taken is designed as 'compensatory payments' such payments are effectively a tax or penalty for the benefit of the producers on the distributors for their use of milk powder. Other courts have recognized that payments labeled compensatory may be more accurately described as penalties on milk distributors. The ADC by this penalty arbitrarily and unreasonably discriminates against a legitimate production process." 383 So.2d 517 (Emphasis added)

In a very similar case, Appeal of Arcadia Dairy Farms, Inc., 223 S.E.2d 323 (N.C. 1976), the Supreme Court of North Carolina held that the North Carolina Milk Commission did not have the power to require a distributor who used reconstituted Wisconsin milk powder to

pay compensatory payments to North Carolina producers. The effect of ADC Order 2-76 is to require Alabama distributors who use milk powder in the production of buttermilk to pay compensatory payments to Alabama milk producers in a similar fashion.

The Court in Arcadia equated such payments with a tax and recognized that "there is no distinction between a tax and the payment required by the order of the Commission". Arcadia also recognized that even if the North Carolina statute had authorized such a milk order that there would be serious doubt it could be reconciled with the due process clause. The North Carolina Supreme Court points out that it is an unconstitutional violation of due process to levy a tax exclusively upon a particular group of companies for the special benefit of a particular group of people.

Petitioners attempt to make much in their brief of some federal regulations in federally regulated milk markets. Petitioners say that such federal regulations are similar to Order 2-76. Nothing in the world could be further from the truth because no milk regulation in the world could be

similar to 2-76, standing alone as it now does without 3-75-1. As shown, under such circumstances 2-76 is a meaningless nullity. It is a rudder without a ship. A limb without a tree. It is classification without subject matter.

Moreover, simply because the Federal Government may have issued some buttermilk regulations under federal law, this certainly did not authorize the Alabama Dairy Commission to impose an arbitrary and unreasonable order like 2-76 on Alabama distributors under Alabama law.

The federal regulations to which Petitioners refer are as different from 2-76 as night is from day. Petitioners are attempting to compare federal marketing orders to something that simply does not exist in Alabama.

However, it is significant that since the downfall of the milk regulatory system in Alabama, pursuant to Dairymen, the milk industry in Alabama is now in the process of changing over to a federally regulated system under the provisions of a federal milk marketing order which is authorized by Acts of Congress and which is in effect in many other states. This is an additional reason that certiorari

should be denied in this case because no questions involving ADC Order 2-76 will recur in the future.

Because it is so obvious that 2-76 is now unconstitutional, Petitioners, in effect, concede that 2-76 is invalid and has no future effect. On pages 42 and 43 of their brief filed herein, the Petitioners state and concede as follows:

> "Even if the amendatory 'buttermilk regulation' was rendered of no future effect by a decision in Dairymen, Inc., supra, or by the subsequent issuance of an injunction by Dairymen, Inc. trial court, it is clear from the context of the dispute in that case that the 'parent' regulation's (Order No. 3-75-1) invalidity dates prospectively from the issuance of the appellate opinion or trial court injunction."

Petitioners then proceed to argue that the unconstitutional declaration of 3-75-1 and 2-76 should have "prospect effect only". Their argument is clearly contrary to general law as declared by this Court and also to Alabama law.

The basic fallacy in such argument by Petitioners is that the constitutionality of 2-76 has been under legal attack from the date of its adoption. The

distributors have done all in their power to demonstrate the invalidity and unconstitutionality of 2-76 since day one when 2-76 was first adopted by the Dairy Commission.

Under such circumstances, the rule of law is that unconstitutional acts, in legal contemplation, are as inoperative as though they had never been passed or as if their enactment had never been written, and they are regarded as invalid or void from the date of enactment, and not from the date on which they are judicially declared unconstitutional. 16 C.J.S., pages 471 and 472.

In addition, all amendments to unconstitutional acts are, likewise, invalid (precisely the situation in the case at bar). This rule is stated in 16 C.J.S. at page 474 as follows:

> "Where a statute is declared unconstitutional, all acts whose effectiveness is made conditional on its validity are, likewise, invalid. So, all acts amendatory of an unconstitutional statute are without force and effect."

Alabama decisions are in accord. In Alabama it has also been stated that an unconstitutional statute is a void act as

if it had never been enacted, rights cannot be acquired under it, contracts and agreements depending solely upon it are void, it can protect no one, and no one can be benefited or required to respond in damages for refusing obedience. Norwood v. Goldsmith, 168 Ala. 224, 53 So.84.

Accordingly, since 2-76 has been under constant legal attack from the date of its adoption and has now been determined to be unconstitutional, it was void from the beginning.

Although the Alabama Supreme Court specifically declined to consider the question, Order 2-76 is also a clear violation of the Commerce Clause since all powdered milk is shipped into Alabama in interstate commerce. The attempt of the ADC to promote the economic welfare of local milk producers by insulating them from out-of-state competition is not a legitimate local interest to justify such absolute discrimination against powdered milk sold in interstate commerce. This Court has consistently so declared in many cases. See for example:

> Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n.9, 84 S.Ct. 378, 386, 11 L.Ed.2d 389 (1964)

Dean Milk Co. v. Madison, 340 U.S. at 354, 71 S.Ct. at 297

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935)

CONCLUSION

Review on writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons therefor. There are no such special and important reasons for this Court to review a decision by the Supreme Court of Alabama declaring an amendment to an unconstitutional order of the Alabama Dairy Commission to also be unconstitutional. In this case, the Alabama Supreme Court carefully considered the relevant law and rendered a correct and fair decision. The decision is in accord with the Dairymen case and is supported by numerous other authorities. It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition has been served upon counsel of record for Petitioners, Henry C. Chappell, Jr., P. O. Box 270, Montgomery, AL 36195 and Charles M. Crook, P. O. Box 78, Montgomery, AL 36101, by placing a copy of same in the United States mail, first-class postage prepaid, on this the 24TH day of September, 1980.

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